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Breaking down (language) barriers: A practical approach to LEP borrowers

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In roughly 5.3 million households in the United States, the head of the house doesn't speak English as the primary language or has limited ability to understand it.[1] But like most individuals seeking full participation in the U.S. economy, those with limited English proficiency need access to credit; the American dream of homeownership, after all, is hardly limited to English speakers.

While lenders are increasingly eager to meet the growing demand for their products by limited English proficiency (LEP) borrowers, a lack of clear legal and regulatory guideposts has stymied many of their efforts. Indeed, the requirements and expectations for delivery of products and services to LEP borrowers remain enigmatic.

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There are, however, ways for lenders and servicers to approach LEP access issues. This article offers a practical approach to creating a LEP program that meets the differing needs of institutions and the consumers they serve.

UNDERSTANDING THE EXISTING LEP ACCESS FRAMEWORK

Federal, state, and municipal regulatory agencies in recent years have turned their attention to financial institutions' LEP access programs. The New York City Department of Consumer Affairs and the Consumer Financial Protection Bureau, for example, have inquired with certain institutions about what they are doing to ensure that LEP customers are able to obtain fair and responsible products and services.

While the inquiries have not resulted in enforcement decisions (and likely were not intended to), they do indicate regulators' expectation that lenders attend to the subject — and signal that clearer guidance on regulatory expectations for treatment of LEP customers may be forthcoming.

In the meantime, institutions should make sure they follow the limited guidance available. This means understanding not only the guidance applicable to the specific activity an institution wants to undertake (e.g., marketing in a foreign language), but also how that activity influences the other aspects of the loan lifecycle.

Indeed, among the greatest risks associated with the provision of LEP products and services is inadvertent commission of an unfair, deceptive, or abusive act or practice, a foundation for which may be created if a company fails to assess the impact of LEP products and services within the context of the entire loan process.

FORGING A PATH AHEAD

Creating an LEP task force

Prior to implementing a new, or enhancing an existing, LEP program, an institution may consider gathering stakeholders from legal, compliance, and the business to create an LEP task force.

Establishing this group may better enable an institution to identify the LEP services currently offered as well as those that could be offered in the future. Importantly, a focused group of diverse stakeholders would allow an institution to better evaluate the risks associated with current and proposed activities in a holistic manner.

Marketing and solicitations

National companies and those located in areas with substantial populations of non-English speakers typically market their products and services in languages other than English, with Spanish being the most common — which roughly 62% of LEP household heads speak.

Companies that identify the need or opportunity to market in a language other than English then must evaluate their actual capacity to do so. As part of the effort to engage in responsible non-English marketing an institution should:

- Vet terminology in non-English marketing materials and confirm it applies consistently in consumer-facing materials and conversations with consumers. A good starting point for the creation of Spanish language marketing materials is the CFPB's Spanish glossary of financial terms.[2]

- Make sure marketing materials comply with the Truth-in-Lending Act (TILA) and Regulation Z's rule related to foreign language disclosures, which specifically prohibit providing information about some triggering terms or required disclosures in a foreign language and others in English within the same advertisement.
- Verify at the outset that the related marketing activities do not trigger any foreign-language disclosure requirements, if the company does not plan to provide origination disclosures in the non-English language used for marketing.[3]
- Consider whether to disclose in marketing materials that all documents will be provided in English — and to avoid the type of bait-and-switch claims made by LEP consumers against other lenders, make sure the terms in the English language disclosures actually mirror the foreign-language marketing materials.[4]

Origination

No law expressly mandates that institutions conduct origination discussions in languages other than English. Additionally, aside from certain origination disclosures that include foreign-language translations alongside the English disclosure (and which are usually mandatory forms developed by the relevant regulator),[5] institutions are generally not required to translate loan documents.

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Where negotiations take place in a language other than English, however, some states require specific loan documents in that language.

For instance, in California, an institution that negotiates a residential mortgage primarily in one of five non-English languages, including Spanish, must generally deliver a translation of the contract or agreement in that other language.[6]

Supervised financial organizations, which includes banks and institutions licensed under California's Financing Law, can satisfy the requirement by providing a translation of the Good Faith Estimate, Loan Estimate, and/or Closing Disclosure (as applicable to the loan transaction).[7]

While negotiating primarily in a language other than English and providing translations may appear straightforward, failure to execute thoughtfully could raise an institution's risk.

An institution conducting origination discussions in languages other than English should develop scripts in those languages to help ensure originators describe terms and conditions, as well any available offers, in a clear and consistent manner. Providing loan originators with discretion to negotiate in a language other than English can make institutions more vulnerable to UDAAP or fair lending claims.

Unfair practices claims could ensue if LEP applicants are not given the opportunity to understand the terms and conditions of the transaction.[8] Fair lending claims could occur if, for example, loan originators don't clearly make available offers known to applicants expressing interest in receiving credit.[9]

Marketing, negotiating, and making certain disclosures in a language other than English could reasonably lead consumers to expect that post-closing conversations and documents will also be in the non-English language. In practice, however, post-closing events often occur in English — thereby laying the foundation for a potential unfairness claim should the customer misunderstand the meaning or significance of future events.[10]

Institutions can mitigate that risk of an unfairness claim by disclosing that while certain aspects of the marketing and originations process are conducted in Spanish — all future written disclosures (including any related to default servicing) will be in English.

Servicing

The limited guideposts for servicer policies and procedures related to LEP borrowers, including the CFPB's examination manual[11] and its spotlight on servicing LEP consumers,[12] reflect a clear expectation that institutions think about how they can better service the LEP community.

A recent settlement between a large nationwide servicer and 48 state attorneys general over improper servicing allegations required the servicer to undertake numerous steps to enhance its practices with respect to LEP borrowers including providing translation services, accepting hardship letters and state and federal government forms in foreign languages, and requiring vendors to implement policies and procedures related to LEP borrowers.[13]

The settlement not only underscores the importance of servicers' attention to LEP borrowers, but could signal the form in which LEP servicing requirements take shape at some point in the future.

Servicers must also be prepared to monitor the changing landscape of state laws. For instance, a new law in California requires certain mortgage servicers that negotiate the residential mortgage modifications or extensions in Spanish, Chinese, Tagalog, Vietnamese, or Korean, and subsequently offers a modification in writing must provide at the same time a specified form summarizing the modified terms in the same language as the negotiation.[14]

The law has implications for servicers that routinely discuss default servicing with customers in languages other than English, but provide all contracts and agreements in English.[15]

CONCLUSION

Although the federal and state statutory landscape lacks clear rules for offering products and services to LEP borrowers, financial institutions are facing increasingly consequential regulatory expectations that, at minimum, should encourage lenders and servicers to revisit the policies and procedures that define how they engage LEP borrowers — and whether they are likely to meet those expectations.

NOTES

[1] The Urban Institute, "Is Limited English Proficiency a Barrier to Homeownership?" (March 26, 2018), https://urbn.is/2NiGZqO.

[2] Consumer Fin. Prot. Bureau, *The CFPB's Glossary of English-Spanish Financial Terms* (Oct. 2015), https://bit.ly/2SSojnG.

[3] There are limited circumstances in which merely marketing or soliciting in a foreign language triggers disclosure requirements. See e.g., Wis. Stat. Ann. § 423.203(2): These are most common in the home solicitation context, which involves face-to-face solicitations.

[4] *See, e.g.,* Consent Order, American Express Centurion Bank, CFPB No. 2013-CFPB-0011 (Dec. 24, 2013), Doc. No. 1, https://bit.ly/2E0Awg1 (resolving allegations that telemarketing sales calls conducted in Spanish to enroll Puerto Rican consumers in an add-on product were deceptive when a bank did not provide uniform Spanish language scripts for the enrollment calls, and all written materials provided to consumers were in English).

[5] In California, for instance, lenders must provide cosigners a specific Cosigner Notice that includes a Spanish translation as required by law. *See* Cal. Civ. Code § 1799.91.

[6] *See* Cal. Civ. Code 1632(b).

[7] Cal. Civ. Code 1632(e); 1632.5(a), (i). *See also* S.B. 1201, Reg. Sess. (Ca. 2017-2018), https://bit.ly/2GDvKZs.

[8] *See e.g.*, Complaint, *Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292, (S.D. Ind. Feb. 26, 2014), ECF No. 1 (private education loan company's alleged practice of rushing students through the process of signing up for loans without giving them an opportunity to understand what they were signing was viewed as an unfair practice).

[9] *See* Consent Order, Synchrony Bank, f/k/a GE Capital Retail Bank, CFPB No. 2014-CFPB-0007 (June 19, 2014), Doc. No. 1 (alleging that the bank excluded Hispanic borrowers with "Spanish-preferred" indicators on their accounts, or who had Puerto Rico mailing addresses from two of its credit card loan modification programs in violation of ECOA and Regulation B).

[10] *See Reyes v. Super. Ct.*, 173 Cal. Rptr. 267 (1981) (finding that a borrower was entitled to a Spanish translation of deficiency or repossession notices, based on California's foreign-language disclosure law, where the borrower did not speak English and the auto loan was negotiated primarily in Spanish).

[11] *See* CFPB, ECOA Baseline Review Procedures at 11 (July 2013), https://files.consumerfinance.gov/f/201307_cfpb_ecoa_baselinereview-module-fair-lending.pdf.

[12] *See* CFPB, Spotlight on serving limited English proficient consumers (Nov. 2017), https://bit.ly/2VcaCwK.

[13] Consent Order at 47, *State of Alabama v. PHH Mortg. Corp.,* No. 1:18-cv-00009 (D.D.C. Jan. 2018), ECF No. 58-1, https://bit.ly/2EnQXV0.

[14] S.B. 1201, Reg. Sess. (Ca. 2017-2018), https://bit.ly/2VcaEVn.

[15] CFPB, Spotlight on serving limited English proficient consumers at 8 (Nov. 2017), https://bit.ly/2GXaBZI ("Most of the institutions reported that their written contracts or agreements were available only in English").

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